

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiffs,

v.

**NOTICE OF MOTION  
AND AFFIRMATION**

JOEL CICERO, et al.,

Docket No. 02-CR-73A

Defendant.

- - - - -

NIAGARA ROAR PUBLICATIONS, INC.  
d/b/a NIAGARA FALLS REPORTER,

Moving Party.

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**NOTICE OF MOTION**

PLEASE TAKE NOTICE that the within Motion will be brought on for a hearing before United States District Judge Richard J. Arcara on Thursday, January 19, 2006 at 9:00 A.M. or at such other convenient date as fixed by the Clerk at the United States Courthouse, Buffalo, New York.

DATED: Buffalo, New York  
January 4, 2006

DAVID GERALD JAY



David Gerald Jay  
Attorney for Witness  
69 Delaware Avenue - Suite 1103  
Buffalo, New York 14202

TO: JOSEPH M. LATONA, ESQ.  
Attorney for Defendant Cicero  
403 Main Street - Suite 716  
Buffalo, NY 14203

KATHLEEN M. MEHLTRETTER, ESQ.  
Acting United States Attorney  
Attn: William J. Hochul, Jr., AUSA  
138 Delaware Avenue  
Buffalo, NY 14202

AFFIRMATION

DAVID GERALD JAY, an attorney at law,  
pursuant to 28 U.S.C. § 1746(2), declares under the penalty of  
perjury that the following is true and correct:

1. I am attorney for the Witness Niagara Roar  
Publications, Inc., doing business under the style and assumed  
name of "Niagara Falls Reporter" and make this affirmation in  
support of the within application to quash the subpoena dated  
July 19, 2005 (a copy of which is hereto annexed) which has been  
served upon my client, currently calling for its attendance as a  
witness in this action in late June, 2006.

2. The Subpoena is overbroad and infringes upon the  
right to freedom of the press as preserved by the first  
amendment.

3. It is conceded that everyman is subject to

examination as a witness in any court proceeding; however, judicial officers stand guard as gatekeeper to insure that the rights of all are preserved.

4. In this case, it is suggested that the procurer of the subpoena should have a threshold requirement to make a showing of relevance of any proposed area of inquiry.

5. Additionally, there are two competing constitutional concerns at play here: (1), the right of the accused to present relevant testimony in his defense - 5th and 6th amendments, and (2), the right of the press to keep its sources and thought processes confidential - 1st and 14th amendments. The Court must balance these two principles and attempt to honor both of them without doing violence to either of them.

6. It is therefore suggested that the defendant upon whose instance this subpoena was issued be directed to make an offer of proof of the evidence he beleives will be elicited from this witness, should the subpoena be honored.


7. Once the offer of proof has been accomplished, the Court will be in a position to rule upon the appropriateness of the suggested areas of inquiry, using the standard tests of

relevance, competence and materiality, with special emphasis being brought to bear on the concept of hearsay, an area which seems to be pervasive in the areas of inquiry alluded to in the subpoena.

8. Once the record has been made, it is suggested that the appropriate remedy will be to grant this application to quash the subpoena.

WHEREFORE, affiant requests that the subpoena be quashed, or for such other, further, different or additional relief as may be just and proper.

Dated: Buffalo, New York  
January 4, 2006

  
\_\_\_\_\_  
David Gerald Jay

AO 89 (Rev. 11/91) Subpoena in a Criminal Case

**United States District Court**

WESTERN

DISTRICT OF

NEW YORK

UNITED STATES OF AMERICA,

v.

**SUBPOENA IN A  
CRIMINAL CASE**

MARK CONGI, JOEL CICERO, et al.,

CASE NUMBER: 02-CR-73A

TO:

NIAGARA FALLS REPORTER  
1625 BUFFALO AVENUE  
NIAGARA FALLS, NY 14303☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE

United States District Court  
Western District of New York  
68 Court Street  
Buffalo, New York 14202

COURTROOM

Part II, 6<sup>th</sup> Floor

DATE AND TIME

September 9, 2005 @ 9:00 a.m.

☐ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

Any notes, memoranda, news article, computer data and/or any other tangible item reflecting any information provided by and/or on behalf of Joseph M. Aragon and/or ProServe Corporation which refers and/or relates to Joel Cicero, Mark Congi, Laborers Local 91, Niagara Falls Bridge Commission and/or World Duty Free America and/or any employee, agent or representative of Laborers Local 91, Niagara Falls Bridge Commission and/or World Duty Free America.

U.S. MAGISTRATE JUDGE OR CLERK OF COURT

DATE

(By) Deputy Clerk

JUL 19 2005

ATTORNEY'S NAME, ADDRESS AND PHONE NUMBER:

Joseph M. LaTona, Esq.  
403 Main Street - Suite 716 716-842-0416  
Buffalo, NY 14203

### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that she is an employee of David Gerald Jay, Esq., attorney for the moving party/witness, NIAGARA ROAR PUBLICATIONS, INC., d/b/a NIAGARA FALLS REPORTER, and is a person of such age and discretion as to be competent to serve papers.

That on January 4, 2006, she served a copy of the attached Notice of Motion and Affirmation by placing a copy in a post-paid envelope addressed to the persons hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States mail at 69 Delaware Avenue, Buffalo, New York 14202.

ADDRESSEE(S): Kathleen M. Mehlretter, Acting US Attorney  
Attn: William J. Hochul, AUSA  
Federal Centre  
138 Delaware Avenue  
Buffalo, NY 14202

Joseph M. LaTona, Esq.  
403 Main Street, Suite 716  
Buffalo, NY 14203

DATED: Buffalc, New York  
January 4, 2006

Priscilla G. Scott